No. 14,703

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Appellants,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,

Appellees.

BRIEF FOR APPELLEE.

ROBERT J. DREWES,
DINKELSPIEL & DINKELSPIEL,
405 Montgomery Street, San Francisco 4, California,
Attorneys for Appellee.

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STATEMENT OF THE CASE.

The defendant Donald G. Carter, as general contractor, entered into two written contracts with the United States of America for the construction of certain buildings at Travis Air Force Base, Solano County, California, and Mather Field, Sacramento County, California (Tr. 5-6, 13). Said contracts provided that Carter would pay all mechanics and laborers employed by him not less than once each week

and in full at wage rates as determined by the Secretary of Labor and set forth in the specifications to the contracts (Tr. 13). The bond sued upon herein was furnished by Carter, as contractor, and executed by the appellee Hartford Accident and Indemnity Company, as surety, pursuant to the provisions of the Miller Act, 40 U.S.C.A. 270, et seq. (Tr. 6).

Pursuant to collective bargaining agreements, the defendant Carter obligated himself to pay into a "Health and Welfare Fund", seven and one-half (7½) cents an hour for each hour worked by the employees concerned. Article 2, Section 3 of the Trust Agreement establishing said fund provides that the contributions thereto shall not be deemed wages, and that the employee-beneficiaries shall not be entitled to receive any part thereof (Tr. 14, Exhibit C). (The beneficiaries of the Trust were not required and did not contribute thereto.) Section 4 of the same article provides that the employee-beneficiaries shall have no title nor interest to the fund other than as provided in the Trust Agreement. To enjoy the benefits of the fund an employee must work four hundred hours in a given six months' period; he need not work on any specific job and may draw benefits even though he is no longer working (Tr. 40).

The defendant Carter became a bankrupt (Tr. 41). It is stipulated that he paid all of the wages required by him to be paid under his contracts with the United States in full and without deduction (Tr. 13, 14). The contributions required of Carter to be made into the fund as described in the complaint on file remain unpaid.

The foregoing facts are not in dispute. Thereon the motion for summary judgment of the defendant and appellee Hartford Accident and Indemnity Company was granted by the Court below, and this appeal followed.

ARGUMENT.

A. EMPLOYER CONTRIBUTIONS TO A "HEALTH AND WELFARE FUND" FALL NEITHER WITHIN THE LETTER NOR THE SPIRIT OF THE MILLER ACT.

The appellants argue that Carter's obligation to make payments into the "Health and Welfare Fund" resulted from collective bargaining negotiations; that they were part of the "compensation" that he agreed to pay for labor; that the Miller Act is to be liberally construed, and to the extent that said contributions were not made, his employees were not paid "in full" as required by the Miller Act.

But the Miller Act is for the protection of, and the bond furnished by this appellee is conditioned upon, payment to *"all persons supplying labor and material in the prosecution of the work provided for in said contract"* and one need not challenge the doctrine of liberal construction, nor question the social and economic importance of health and welfare funds to demonstrate that the payments here in question fall neither within the letter nor the spirit of the Miller Act.

Before a plaintiff, such as appellants were below, can recover in an action upon a surety's bond, he

must establish first, that he furnished labor, and secondly, that the labor was furnished in the prosecution of the work provided for in the contract.

The contracts between the defendant Donald G. Carter and the United States provided that the former would pay the wages set forth in the specifications as determined by the Secretary of Labor, and it has been admitted that they were so paid, in full and without deduction. The payments which Carter bound himself to make to the "Health and Welfare Fund" do not relate in any way to the prosecution of the work provided for in the contracts. The payments were based upon man hours of work as a convenient, probably the only, method of providing so-called "fringe benefits" for workers in an industry characterized by irregular employment on an hourly basis, and no more furthered the construction of the buildings at Travis Air Force Base and Mather Field than would promises by Carter to provide work clothes, tools or a "coffee break". The contributions to the welfare fund were not wages, but employee benefits relating to the conditions of employment, AS A MATTER OF LAW AND BY AGREEMENT OF THE PARTIES, having no relationship to the prosecution of the work and arising out of a collective bargaining agreement to which neither the United States nor this respondent were parties.

The Attorney General of the State of California has expressed his views concerning the nature of contributions identical to those at bar. In 22 *Opinions of the Attorney General,* 198, he distinguished "be-

tween pay and compensation on the one hand and the conditions of employment on the other'' and concluded that payments such as these fall within the latter category. It was this citation, included by appellee in its Memorandum of Points and Authorities in Support of Motion for Summary Judgment, filed with the clerk of the Court below, which has led appellants to state on page 6 of their brief, and again at page 9, that the appellee concedes that health and welfare contributions are a part of the compensation agreed to be paid by the contractor for the services of labor. This respondent made no such concession and none can be inferred from a reading of the authority cited.

The test as to whether or not one supplying labor or materials can recover against the surety was stated by the Supreme Court of the United States in *Brogan v. National Surety Co.,* 246 U.S. 257, 38 S.C. 250, 62 L.Ed. 703. There the plaintiff furnished food and provisions to a contractor carrying on his work ''in a comparative wilderness at some distance from any settlement'' . . . where ''there were no hotels or boarding houses''. The trial Court found that ''they were necessary to and wholly consumed in such work'' and gave judgment for the plaintiff. The Court of Appeals reversed. The Supreme Court reversed, and in an opinion by Justice Brandeis, said, ''The Circuit Court of Appeals deemed immaterial the special circumstances under which the supplies were furnished and the findings of fact by the Trial Court that they were necessary to and wholly consumed in

the prosecution of the work provided for in the contract and bond. *In our opinion these facts are not only material, but decisive. They establish the conditions essential to liability on the bond.*" And District Judge Baldwin in *United States to the use of Watsabaugh & Co. v. Seaboard Surety Co.,* 26 Fed. Supp. 681, after reviewing many of the leading cases which had been decided as of the date of his opinion, phrased the rule as follows:

> "The thought underlying each of the decisions in which it is held that the thing for which claim was made falls within the meaning of the words 'labor and materials' as used in the act involved in this case, is that the thing supplied was essential to carrying on and completing the work provided for in the contract and was wholly consumed in that work".

That the payments which Carter obligated himself to make into the welfare fund were not essential to the construction of the Government's buildings at Travis Air Force Base and Mather Field and created nothing which was or could be consumed therein, is too clear to require elaboration.

No case has been found in which the precise point at bar has been decided. However, analogous questions have heretofore been decided on similar facts. In *City of Portland ex rel. National Hospital Association v. Heller*, 9 Pac. (2d) 115, the contractor contracted with the plaintiff to pay for medical services to be rendered by the latter to the former's employees, the consideration therefor to be based upon the number of employees and the days worked by

each, said consideration to be deducted from the wages due. The plaintiff brought its action against the contractor and the latter's surety for a balance due it for such services, and recovered judgment. The Supreme Court of Oregon reversed as to the surety, saying:

> "It is admitted that the service rendered by the association is not 'labor or material' furnished under the contract of the contractor with the City of Portland for which the surety is bound",

and:

> "It makes little difference whether we treat this case as an action at law or as a suit in equity; in either event, there is no evidence on which to base a finding and judgment against the surety."

In *United States ex rel. Southern G.-F. Company v. Landis & Young,* 16 Fed. Supp. 832, the American Employers Insurance Company, as intervenor, sought to recover premiums upon a policy of employers liability insurance, contending that it had furnished labor in the form of medical attention, medicines, and hospital services. In a carefully considered and well reasoned opinion, the Court denied the claim, saying in part:

> "It is not contended that any materials other than medicines and hospital treatment, were actually furnished by this intervenor, and, if it is to recover, the same must be upon the theory that the amount claimed was for labor furnished in the prosecution of the work. Payment of hospital and doctor bills could only indirectly affect the progress of the work by restoring the laborer

to a condition which would enable him to subsequently return to the job."

The appellants have cited and quoted from *Coos Bay Lumber Co. v. Local 7-116 International Woodworkers of America (CIO),* 279 Pac. (2d) 508. The question in that case was whether or not federal or state law authorized a union, through collective bargaining, to commit the wages of the employees which it represented to the financing of employee group insurance programs. It would appear to have no relevancy whatsoever to the question as to whether the trustees of a welfare fund can recover unpaid contributions from a Miller Act surety. The appellants also cite and rely upon the case of *Sherman v. Achterman* decided by the Appellate Department of the Superior Court of the State of California upon facts substantially the same as those in the case at bar. In that opinion, the majority of the Court distinguished the provisions of the Miller Act from those of the applicable state statute. If there be no distinction, that case was wrongly decided for the reasons heretofore given. The attention of this Honorable Court is directed to the fact that the Honorable Daniel R. Shoemaker dissented, and that of the five learned judges who have been called upon to decide the question at bar, three have agreed with the respondent.

B. THE OBJECTIVES OF THE MILLER ACT HAVE BEEN FULLY ACCOMPLISHED.

The appellants assert that one of the objectives of the Miller Act is to avoid delays in the construction of government projects by assuring prompt payment of those furnishing labor and materials thereto; that if Carter failed or refused to make the contributions, his employees would strike, thereby delaying or terminating construction. There appearing to be many objectives, some good and some bad, which organized labor seeks to obtain by strike action, the argument appears to this respondent to be singularly without force. *But the short answer is that the Miller Act accomplishes the stated purpose by requiring that contractors also furnish a performance bond.* Carter did so (Tr. 13-14, Exhibit A).

The primary purpose of the Miller Act is to provide for persons supplying labor and materials on federal construction projects protection equal to that given in private construction by mechanics and materialmen's liens, and also to protect the United States (*United States to the use of Gibson v. Harman,* 192 Fed. (2d) 999); and the statutes creating these liens are "meant to protect and favor those who actually worked on, or contributed labor or materials to, the construction, improvement or repair of a building or other structure, *thereby enhancing its value* (*In re Louisville Daily News & Inquirer,* 20 Fed. Supp. 465, 466). Although no cases have been found, it could hardly be supposed that, were these private buildings, they would be lienable under the Mechanics' Lien laws for the unpaid contributions. The beneficiaries

have been paid the wages due them for their contribution to the buildings; the sums unpaid are for benefits which are unrelated to the construction of the buildings and add nothing to the value thereof (*United States ex rel. Southern G.F. Company v. Landis & Young,* supra).

C. THE SURETY IS NOT LIABLE FOR ATTORNEYS' FEES NOR FOR LIQUIDATED DAMAGES.

The appellants state on page 22 of their brief that "Liquidated damages and attorneys' fees were a part of the agreed payment for labor . . . and as a part of such agreed payment, they should also be recoverable against the surety under a Miller Act bond". Inasmuch as they make no attempt to distinguish between contributions to the welfare fund, attorneys' fees and liquidated damages, the appellants apparently take the position that any benefits given by a contractor-employer to his employees as a result of collective bargaining, and any agreed monetary value ascribed thereto by the parties, is recoverable against a Miller Act surety in that amount. Such can hardly be the law.

Mechanics' liens were unknown at common law or at equity and are purely statutory (*In re Louisville Daily News & Inquirer,* supra). In the absence of a valid statute that expressly authorizes an allowance or taxation of attorneys' fees as costs, they may not be allowed or taxed as costs (*United States to use of Watsabaugh & Co. v. Seaboard Surety Co.,* supra).

The Miller Act makes no provision for the allowance of attorneys' fees in actions upon contractor's bonds. *United States v. Breedon,* and *United States v. Henley,* cited by the plaintiffs, were actions against Miller Act sureties. The Courts therein allowed attorneys' fees upon the grounds that the statutes of Alaska and Idaho, respectively, provided for attorneys' fees in actions to foreclose mechanics' liens. How a territorial or state statute can supply an omission of Congress to provide for such fees in a federal statute is difficult to understand. *United States v. Breedon* and *United States v. Henley* are in conflict with *United States to use of Watsabaugh & Co. v. Seaboard Surety Co.* and, it is submitted, were wrongly decided.

The respondent, Hartford Accident and Indemnity Co., was not a party to the Trust Agreement, and as to it, the appellants' damages, if any, are unliquidated. It is well settled that unliquidated damages may not be recovered from a surety on a contractor's bond (*Terry v. U. S. Fidelity & Guaranty Co.,* 82 Pac. (2d) 532, 119 A.L.R. 1276).

CONCLUSION.

The Courts of the United States and the Courts of the several states have often been called upon to determine whether certain types of services or certain kinds of materials, under certain circumstances, fall within the scope of contractors' statutory bonds; scores of such decisions are to be found in the books.

True it may be that these contributions are of more than ordinary social and economic importance; true it may be that the contributions are of great importance to those who are to enjoy the benefits which they make possible. But these considerations are of no assistance in the determination of whether such contributions may be recovered against a surety under a Miller Act bond. If they are not fairly within its intended scope, then those to whom they were to be paid must look for satisfaction to him who made the promise; if he is, or may become, judgment proof, that is but a contingency to which all would be litigants are exposed.

Here the contractor and his employees, through their representatives, entered into an agreement whereby the former agreed to make certain payments into a fund based upon man hours of work, the fund to be used to obtain medical and hospital benefits for the workers. The latter received nothing tangible and could enjoy the benefits only upon satisfying certain eligibility conditions; and the parties took pains to expressly stipulate that the said payments were not wages and that the employees had no direct interest therein. The method selected by the parties was one conveniently adapted to achieve the benefits desired. The same objectives could have been obtained had Carter contracted with a hospital to furnish the same services as in the *City of Portland* case; or with an insurer, as in *Landis & Young;* or had he himself directly employed a physician with the necessary equipment and staff: in all of which instances it

is clear that the persons furnishing the services could not recover from the surety therefor. The obligations incurred by Carter were not compensation for labor in the economic sense of a "price" for labor determined by the forces of supply and demand in a free market, but related to the conditions of labor, and were a part of his overhead or cost of doing business, just as was the cost of his contractor's permit (see *Landis & Young*).

The contributions were not payments for labor which were necessary to the construction of the buildings at Travis Air Force Base and Mather Field, nor were they for labor which was consumed therein. Carter's employees were paid in full for the labor which they supplied thereon and the value which they thereby created.

We respectfully submit that the judgment below should be affirmed.

Dated, San Francisco, California,
August 10, 1955.

Robert J. Drewes,
Dinkelspiel & Dinkelspiel,
Attorneys for Appellee.